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In The Supreme Court of the United States

RICHARD E. GLOSSIP, *ET AL.*,

Petitioners,

v.

KEVIN J. GROSS, *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides *pro bono* legal representation to individuals whose civil liberties are threatened and educates the public about constitutional and human rights issues.

Among the purposes of The Rutherford Institute is to foster respect for the uniqueness and paramount worth of human life and to stridently defend fundamental notions of fairness and equality under the law. These values find their roots in an informed citizenry that has the knowledge to hold its government accountable.

The Rutherford Institute is interested in this case because it believes that if the death penalty is to remain a form of punishment in this country, then the methods of execution employed—including the properties of the lethal injection drugs—must be subject to scrutiny by inmates, courts, and citizens. Such review is crucial to safeguarding the

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[1] All parties to this matter have granted blanket consent for amicus curiae briefs in support of either or neither party. Petitioners filed such consent on March 4, 2015, and Respondents filed such consent on March 6, 2015. The requirements of Rule 37.2(a) of the rules of this court are satisfied by these filings. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

constitutional right against cruel and unusual punishment. Moreover, it will ensure informed discourse regarding the death penalty that is vital to constitutional jurisprudence and the growth and progress of the nation.

SUMMARY OF THE ARGUMENT

Amicus supports Petitioners' claim that Oklahoma's use of midazolam as the first drug in its three-drug lethal injection protocol violates the Eighth Amendment standard set forth in *Baze v. Rees*, 553 U.S. 35 (2008). Because the drug does not anesthetize a person completely, its use poses an unconstitutional risk that the inmate will remain conscious as the next two drugs in the sequence, pancuronium bromide and potassium chloride—which cause excruciating pain—are administered.

Rather than repeat Petitioners' arguments, this brief calls attention to the tendency of some states to keep the sources of their lethal injection drugs secret. *Amicus* believes that understanding current state practices may inform any guidance the Court might provide in resolving the question currently before it.

ARGUMENT

I. BASIC INFORMATION ABOUT A STATE'S LETHAL INJECTION DRUG SUPPLY IS OFTEN SHROUDED IN SECRECY

States' lethal injection practices have never

been a paragon of transparency.[2] In the years since *Baze v. Rees*, 553 U.S. 35 (2008), however, the secrecy has worsened. Since then, a growing number of states have adopted secrecy laws shielding the source of their lethal injection drugs from any form of public review. Even states that have not adopted such laws have resisted disclosure of such information on other grounds.

The impetus for these laws is no secret. Shortages of lethal injection drugs since 2011 have forced states to turn to less conventional means to obtain their drugs—most commonly, compounding pharmacies, which are subject to less rigorous regulation. States claim that their secrecy laws preserve the anonymity of these pharmacies, which otherwise face harassment. But even if that is true, the secrecy has extended beyond the identities of the compounding pharmacies to shield even their safety records and laboratory test results. In short, the secrecy extends to the very information necessary to determine whether a drug will work in a constitutional manner.

Of the thirty-four states that use lethal injection, at least twelve have adopted laws or policies resisting disclosure of their lethal injection drug suppliers:

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[2] *See, e.g.*, Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 Geo. L.J. 1331, 1379-80 (2014) (noting that, at the time of her 2005 study of lethal injection protocols, "one-half of the states that applied lethal injection did not allow any evaluation of their protocols, either because the information is confidential or nonexistent").

Since 2011, six states have enacted supplier-secrecy statutes expressly preventing the public from learning where the states obtained their lethal injection drugs.[3] In 2011, Oklahoma became the first state to enact such a law in response to the drug shortage, providing complete anonymity to drug suppliers and shielding them from all civil or criminal discovery.[4] Georgia, Arkansas, South Dakota, and Tennessee followed suit in 2013.[5] Georgia conferred "confidential state secret" status on the identities of drug suppliers, while Arkansas exempted such information from the state's Freedom of Information Act. Most recently, in December 2014, Ohio passed a supplier secrecy law protecting suppliers of lethal injection drugs from having their names divulged for 20 years.[6]

Two states, Arizona and Missouri, have achieved the same result by reinterpreting existing secrecy statutes shielding "members" of the execution team to encompass drug suppliers as well.[7]

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[3] A seventh state, Florida, has long exempted information about persons who compound drugs from its public records inspection statute, pre-dating the current drug shortage. *See* Fla. Stat. Ann. § 945.10(1)(g) (2014); 2000 Fla. Sess. Law. Serv. Ch. 2000-1 (S.B. 4A).

[4] Okla. Stat. § 22-17-1015(B) (2011).

[5] Ark. Code § 5-4-617 (2013); Ga. Code. Ann. § 42-5-36(d)(1)-(2)(2013); S.D. Codified Laws § 23A-27A-31.2 (2013); Tenn. Code Ann. § 10-7-504(16)(h)(1) (2014).

[6] Ohio Rev. Code § 2949.221 (2015); Alan Johnson, *New Law Will Keep Lethal Injection Drug Supplier Secret*, Columbus Dispatch, Dec. 20, 2014, http://www.dispatch.com/content/stories/local/2014/12/19/new-law-will-keep-lethal-injection-drug-supplier-secret.html.

[7] *See* Press Release, Arizona Attorney General's

Lastly, three other states—Texas, Idaho, and Pennsylvania—do not have secrecy laws, but have nevertheless attempted to withhold drug supplier information as a policy matter.[8]

States have construed these laws broadly to shield all information that *might* permit a compounding pharmacy to be identified.

Thus, relying on these secrecy laws, some states have refused to provide any evidence of laboratory testing or other assurances of quality—to prisoners, the media, and even courts. In the days leading up to Michael Anthony Taylor's execution in Missouri, for example, Missouri refused to admit that its drugs were compounded or to permit them to be tested. *See Taylor v. Lombardi*, No. 14-1388, slip

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Office, *State of Arizona Announces Change to Lethal Injection Protocol* (Mar 26, 2011), *available at* https://www.azag.gov/press-release/state-arizona-announces-change-lethal-injection-protocol *and* Ariz. Rev. Stat. Ann. § 13-757(C)(2009) (shielding the "identity of executioners and other persons who participate or perform ancillary functions in an execution"); Press Release, State of Missouri Dep't of Corrections, *Missouri Department of Corrections Adopts New One-Drug Execution Protocol* (Oct. 22, 2013), *available at* http://doc.mo.gov/PressReleases/2013/20131022.pdf (adding a compounding pharmacy to its execution team) *and* Mo. Rev. Stat. 546.720(2) (2007).

[8] *See* Ed Pilkington, *Pennsylvania Challenged Over Execution Drugs Secrecy in Federal Court*, The Guardian, Sept. 17, 2014, http://www.theguardian.com/world/2014/sep/11/aclu-challenges-pennsylvania-lethal-injection-secrecy; Terri Langford, *AG: Prisons Can Keep Info About Execution Drugs Secret*, Texas Trib., May 29, 2014, https://www.texastribune.org/2014/05/29/ag-says-prisons-can-keep-execution-drugs-secret; *Idaho Refuses to Disclose Lethal Injection Drug Source*, KTVB.com, May, 1 2014, http://www.ktvb.com/story/news/local/2014/07/03/12163337.

op. at 3 (8th Cir. Feb. 25, 2014) (Bye, J., dissenting) ("Although there were concerns with previous laboratory testing, at least some laboratory testing was conducted. Now, Missouri has provided no indication any testing of the new product has occurred."), *cert. denied*, 134 S. Ct. 1375 (U.S. Feb. 25, 2014); *Landrigan v. Brewer*, 625 F.3d 1132, 1135 (9th Cir.) (noting that "[t]he State [of Arizona] made no showing about the efficacy of the drug it obtained," and that it did not even submit an affidavit stating that the drug was obtained through reputable sources or there was no reason to question that it would function as intended), *vacated*, 131 S. Ct. 445 (2010).

Still others have represented that the drug they intend to use is sufficiently potent, while steadfastly refusing to turn over the underlying basis for their assurances. *See, e.g.*, *Ladd v. Livingston*, 777 F.3d 286, 289 (5th Cir.) (State of Texas maintained that its pentobarbital was unexpired, obtained from a licensed compounding pharmacy and found to be free of contaminants), *cert. denied*, 135 S. Ct. 1197 (2015); *Sells v. Livingston*, 750 F.3d 478, 481 (5th Cir. 2014) (State of Texas disclosed that "the batch from which the dose will be taken has been tested by an independent laboratory. That test revealed that it has a potency of 108%, and is free of contaminants."). Although better than not offering assurances as to the quality of the drug at all, such statements amount to little more than a "just trust us."[9]

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[9] On February 9, 2015, in response to the growing number of lethal injection secrecy laws, the American Bar Association passed Resolution 108B, calling for "open and

II. SUCH SECRECY IS PARTICULARLY TROUBLING IN LIGHT OF THE RISKS OF COMPOUNDED DRUGS

Whether or not a drug will work as intended can make the difference between a quiet death and an excruciating one that violates the Eighth Amendment.[10] If the compounding process is performed correctly, it can result in a safe, effective drug that will function as an equivalent to the manufactured version of the same drug. But the risk that a compounded drug may be contaminated is all too real. In October 2012, South Dakota executed Eric Robert using a dose of compounded pentobarbital. Robert began snoring and then remained open-eyed during the twenty minutes it took for him to die.[11] The pentobarbital was later

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transparent" disclosure of execution protocols. *See* American Bar Association, Report to House of Delegates, Resolution 108b (Feb. 9, 2015), *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2015_hod_midyear_meeting_108b.docx.

[10] An execution dose of pentobarbital, for instance, is meant to quickly render an inmate unconscious and without awareness until death occurs. By contrast, the effect of *contaminated* pentobarbital has been described as sandpaper on the inside of one's veins. Molly Redden, *New Lethal Injections Could Cause Extreme Pain, Make Deaths "Drag On" for Hours*, Mother Jones, Nov. 7, 2013, http://www.motherjones.com/politics/2013/11/ohio-lethal injection-cocktail-execution-drugs.

[11] Dave Kolpack & Kristi Eaton, *Eric Robert Execution: South Dakota Executes Inmate Who Killed Prison Guard*, Huffington Post, Oct. 16, 2012, http://www.huffingtonpost.com/2012/10/16/eric-robertexecution_n_1969640.html.

found to be contaminated with fungus.[12] In January 2014, during Oklahoma's execution of Michael Lee Wilson with compounded pentobarbital, he cried out, "I feel my whole body burning," a sensation consistent with that caused by contaminated pentobarbital.[13] Most recently, in early March 2015, a Georgia woman's execution was called off when prison officials noticed the compounded pentobarbital planned for her lethal injection appeared cloudy rather than clear.[14]

These incidents highlight the risks of a system that allows states to use compounded drugs with little to no checks or balances.[15] Compounded drugs

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12 *South Dakota Carries Out Execution Using Contaminated Compounded Drug*, Reprieve, Oct. 17, 2012, http://www.reprieve.org.uk/press/2012_10_17_compound_pharmacy_death_penalty.

13 Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate Over Lethal Injections*, N.Y. Times, Jan. 16, 2014, http://www.nytimes.com/2014/01/17/us/ohio-execution-using-untested-drug-cocktail-renews-the-debate-over-lethal-injections.html.

14 Alan Blinder, *Georgia Postpones 2 Executions, Citing 'Cloudy' Drug*, N.Y. Times, Mar. 3, 2015, http://www.nytimes. com/2015/03/04/us/execution-of-georgia-woman-is-postponed-indefinitely.html.

15 Since late 2012, at least five states have carried out executions using compounded drugs: Georgia, Missouri, Oklahoma, South Dakota, and Texas. *See* Nathaniel N.W. Crider, *What You Don't Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, 48 COLUM. J. L. & SOC. PROBS. 1, 3-4 n.12,13 (2014). At least another four have announced their intentions to rely on compounded drugs, but have not yet carried out executions using compounded drugs: Louisiana, Mississippi, Ohio, and Pennsylvania. *Id.*

are not approved by the Food and Drug Administration ("FDA") and need not meet FDA standards.[16] Inspections by the Missouri Board of Pharmacy have found that about one out of every five drugs made by compounding pharmacies in that state failed to meet standards.[17] Between 2012 and

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These nine states collectively carried out 54 of the 74 executions (or 73% of the executions) between 2013 and 2014. *See Execution List 2013*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/execution-list-2013 (last visited Mar. 15, 2015) *and Execution List 2014*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/execution-list-2014 (last visited Mar. 15, 2015).

[16] For instance, a 2003 FDA report revealed that of 29 samples of products collected from 12 different compounding pharmacies, ten (or 34%) failed one or more of the standard quality tests performed. *See* Report: Limited FDA Survey of Compounded Drug Products, FDA, http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm155725.htm (last visited Mar. 15, 2015). By contrast, the failure rate for commercially-produced samples was less than 2%. *Id.*

Similarly, a 2006 FDA report sampled 198 products from compounding pharmacies throughout the country, broken down into 125 active pharmaceutical ingredients and 73 finished compounded drug products. *2006 Limited FDA Survey of Compounded Drug Products*, FDA, http://www.fda.gov/ Drugs/GuidanceComplianceRegulatory Information/PharmacyCompounding/ucm204237.htm (last visited Mar. 15, 2015). All 198 drugs were analyzed for identification of active ingredient, potency, and for drugs in capsule form, content uniformity. *Id.* Although all active ingredients passed analysis, a third of the compounded drugs failed. *Id.*

[17] Chris McDaniel, *Federal Judges Rule Execution Drug Supplier Can Be Secret, But Documents Point To Likely Identity*, St. Louis Public Radio, Jan. 25, 2014, http://news.stlpublicradio.org/post/federal-judges-rule-

2014, nearly a third of Ohio's 61 state-licensed compounding pharmacies were cited for various violations, including two resulting in license revocations.[18] The quality of compounded drugs from the same pharmacy can also vary from batch to batch, as compounding pharmacies make customized drugs on an as-needed basis.[19]

There is, moreover, reason to question whether states do sufficient due diligence on a pharmacy before utilizing it. In many cases a state is driven to a particular pharmacy because it is the only one willing to provide a compounded drug.[20] In March 2013, for example, the Colorado Department of Corrections mass-mailed nearly a hundred local compounding pharmacies seeking to "acquire sodium thiopental or other equally or more effective substance to cause death."[21] Meanwhile, an

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execution-drug-supplier-can-be-secret-documents-point-likely-identity.

[18] Alan Johnson, *Secrecy For Lethal Injections Nears Ohio Legislature's OK*, Columbus Dispatch, Dec. 17, 2014, http://www.dispatch.com/content/stories/local/2014/12/17/secrecy-for-lethal-injections-nears-legislatures-ok.html.

[19] *See* Denno, *supra* note 2, at 1336-1375.

[20] *See, e.g.*, Meg Kinnard, *South Carolina Has Run Out Of Lethal Injection Drug*, Associated Press, Mar. 9, 2015 http://www.thestate.com/2015/03/09/4035143/south-carolina-has-run-out-of.html; Mark Berman, *Texas Is About To Run Out Of Lethal Injection Drugs*, Wash. Post, Mar. 10, 2015, http://www.washingtonpost.com/news/post-nation/wp/ 2015/03/10/texas-is-about-to-run-out-of-lethal-injection-drugs.

[21] Tim Hoover, *Colorado Asks Pharmacists For Help In Securing Lethal Injection Drug*, Denver Post, Mar. 12, 2013, http://www.denverpost.com/ci_22775748/colorado-asks-pharmacists-help-securing-lethal-injection-drug.

investigative piece by St. Louis Public Radio in late 2013 revealed that Missouri's drug supplier was located in Oklahoma—and thus not even overseen by the Missouri Board of Pharmacy.[22]

Without transparency, it becomes impossible to test that state's protocol against the Eighth Amendment standard set forth in *Baze*. 553 U.S. at 49-50.[23] For instance, the Fifth Circuit requires an inmate to "offer some proof that the state's own process—that its choice of pharmacy, that its lab results, that the training of its executioners, and so forth, are suspect" to make out a viable Eighth Amendment claim. *Ladd*, 777 F.3d at 289 (*quoting Whitaker v. Livingston*, 732 F.3d 465, 468 (5th Cir. 2013)). But a State need simply claim reliance on its secrecy statute to avoid disclosing any of the above pieces of information—allowing it to avoid Eighth Amendment scrutiny altogether. This should not and cannot be the rule.

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[22] Chris McDaniel & Veronica LaCapra, *Investigation: Missouri's Execution Drug Source Raises Legal, Ethical Questions*, St. Louis Public Radio, Dec. 31, 2013, http://news.stlpublicradio.org/post/investigation-missouris-execution-drug-source-raises-legal-ethical-questions. In fact, the purchase of drugs from a compounding pharmacy not licensed in Missouri violates Missouri state law. *Id.*

[23] *See generally* Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C.L. REV. 1367 (2014); *see also* Crider, *supra* note 15.

CONCLUSION

To the extent that the Court considers this issue at all, *Amicus* respectfully submits that any guidance this Court provides should emphasize the importance of information and transparency in lethal injection practices.

Respectfully submitted,

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